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No. 74-1486

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

CALMAN BERNSTEIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-18a) is reported at 509 F.2d 996. The opinions of the district court (Apps. D and E, *infra*, pp. 21a-51a) are reported at 363 F. Supp. 438 and 368 F. Supp. 757.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1975 (App. B, *infra*, p. 19a). A petition for rehearing with a suggestion for rehearing *en banc* was denied on March 28, 1975 (App. C, *infra*, p. 20a). On April 24, 1975, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 27, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2518(1)(b)(iv) requires the identification in a telephone interception application of all persons who the government has probable cause to believe will participate in conversations over the telephone line relating to the specified illegal activity.

2. Whether, if the statute is read to require the naming of all such persons, a good faith failure to identify one such person is grounds for suppression as to him of the evidence derived from the otherwise lawful interception of his conversations.

STATUTORY PROVISION INVOLVED

18 U.S.C. 2518. *Procedure for interception of wire or oral communications.*

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing

upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information;

* * * * *

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including * * * (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

* * * * *

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

* * * * *

STATEMENT

On March 30, 1972, Judge Watkins of the United States District Court for the District of Maryland issued an order pursuant to Title III of the Omnibus Crime Control and Safe Streets Act authorizing the interception of communications of "Robert C. Curreri, an individual known as Bernice and others as yet unknown" over four telephones used by Curreri in conducting his gambling business (C.A. App. 39-42). The authorization was effective for a period of 15 days. On April 14, 1972, Judge Watkins extended the March 30 order for an additional 15 days with respect to three of the four telephones involved in the March 30 order. The April 14 order stated that the three telephones were used by "Robert S. Curreri, Gina Gomez, John Thomas Chalk, Frank Kagler, Willie Reaves, Jr., and others as yet unknown" in connection with Curreri's gambling business (C.A. App. 69-72).[1]

Respondent Calman Bernstein and nine others were subsequently charged with conducting an illegal

[1] On May 1 and May 17, 1972, Judge Watkins authorized two additional 15-day periods of interceptions of communications of Curreri and others (C.A. App. 114-117, 141-144); those two interceptions are not pertinent to the issues raised herein.

gambling business in violation of 18 U.S.C. 1955 (C.A. App. 12-13).[2] The defendants filed several pretrial motions to suppress evidence derived from the wire interceptions, which were denied by District Judge Blair (*United States* v. *Curreri*, 363 F. Supp. 430, 438). Bernstein also moved to suppress evidence derived from the March 30 and April 14 interceptions on the ground that the government failed to identify him in the intercept applications and orders. In a separate memorandum and order (App. D, *infra*), Judge Blair ordered that an evidentiary hearing be held on that motion to determine whether there was "strong and clear, and not questionable, * * * probable cause existing at the time of the application" that Bernstein was both involved in the criminal activity under investigation and likely to use the target telephones in furtherance of that activity (App. D, *infra*, p. 29a).[3]

[2] The nine persons indicted with Bernstein included one of the individuals named in the April 14 order, Gomez. Curreri and the others named in the order were among those included in a separate indictment. The cases were consolidated for trial; one defendant died, and all the others except Bernstein have pleaded guilty (C.A. App. 10-11).

[3] Judge Blair believed that the "strong and clear" standard avoided the difficulty he recognized with a simple probable cause standard, which "could put the government in a awkward and unfairly precarious position of having to choose whether to name the individual in the application when questionable probable cause exists and risk being turned down by the authorizing judge as to that person, or proceed to investigate under the authorization of 'others yet unknown' and face a possible challenge that the individual should have been named in the order" (App. D, *infra*, p. 29a).

After the hearing, Judge Blair concluded that there was not sufficiently strong probable cause that Bernstein would use the target phone to justify identifying him in the original application and the March 30 order, but that after he was heard discussing gambling with Curreri on April 11, he should have been named in the application for the April 14 extension order (App. E, *infra*, p. 41a).[4] Accordingly, Judge Blair denied the motion to suppress with respect to interceptions made under the original order but granted respondent's motion as to his conversations overheard under the April 14 extension order.

The court of appeals affirmed the district court's order suppressing for use against respondent his conversations intercepted under the April 14 order (App. A, *infra*). Relying on dictum in *United States* v. *Kahn*, 415 U.S. 143, 155, the court held that the government must identify every person who it has probable cause to believe is both committing the crime being investigated and conversing on the telephone line that is being monitored (App. A, *infra*, p. 12a). Presumably applying the simple probable cause test rejected by the district court, the court held that "[a] detached observer could conclude from the evidence available before April 14 that the government

[4] There was a conversation on April 12 containing a passing reference to Bernstein. The court did not consider this in evaluating probable cause for the application for the April 14 extension order, recognizing that "the sheer mechanics of the tap would not enable the government to process the information quickly enough to utilize it in the application of April 14 (App. E, *infra*, p. 44a).

had probable cause to believe that Bernstein was still handling Curreri's layoff and on occasion would talk with him about the business on a tapped phone" (*id.* at 15a).

The court of appeals further concluded that the identification requirements were essential to the congressional purpose of assuring adequate executive and judicial review of interception authorizations, and thus that, under the test enunciated in *United States* v. *Giordano*, 416 U.S. 505, the failure to identify Bernstein required suppression (App. A, *infra*, pp. 4a-11a).

REASONS FOR GRANTING THE WRIT

The decision below poses serious practical problems for administration of the authority conferred by Congress to utilize electronic interceptions for law enforcement. It does so, moreover, without significantly furthering any substantial policy interest. The result reached by the court of appeals is not required either by the plain language of the statute, congressional intent, or prior decisions of this Court. It is important to the future administration of Title III that this Court resolve the issues presented by this petition.[5]

[5] The decision below conflicts with that of the panel in *United States* v. *Doolittle*, 507 F. 2d 1368 (C.A. 5). In *Doolittle*, upon facts similar to those in the instant case, the court held that in the absence of prejudice to the defendant or evidence of government bad faith, suppression was not required because there was substantial compliance with Title III. Since, however, the Fifth Circuit granted the defend-

1. The decision of the court of appeals represents an unwarrantedly expansive reading of the statutory language, which requires the identification in applications for interception orders of only one "person, if known, committing the offense and whose communications are to be intercepted" (18 U.S.C. 2518 (1)(b)(iv)),[6] not of any and all such persons. The interpretation most consistent with the statutory language, accordingly, is that, although it would ordinarily be expected that many persons will be overheard, only the principal target of the interception (ordinarily the individual whose phone is to be monitored) need be named; thus, the statute does not require the naming of all those with whom the target could be expected to discuss illegal activities or who might predictably use the target telephone to discuss such activities.[7] Instead, once the principal target is

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ants' petition for a rehearing *en banc* in *Doolittle* on April 7, 1975, we do not here contend that review by this Court is presently necessary to resolve an established conflict among the circuits. *United States* v. *Donovan*, C.A. 6, No. 74-1553, decided March 17, 1975, petition for rehearing *en banc* pending, is in accord with the instant case.

[6] The further requirement in 18 U.S.C. 2518(4)(a) that the interception order specify the "identity of the person, if known, whose communications are to be intercepted" simply tracks the identification requirement for the application. *United States* v. *Kahn*, 415 U.S. 143, 152.

[7] The application at issue here in fact named, in addition to the principal target, Curreri, four other individuals whom the agents expected to overhear conversing about gambling. We submit that the identification of these persons was not required by the statute; it was made because of uncertainty regarding the matter that we are here asking this Court to resolve.

named, all conversations relating to the illegal enterprise on the target phone may be properly overheard.[8] It is established that all such conversations involving the named target and those who were not known to be his co-conspirators when the order issued may be so overheard (*United States* v. *Kahn*, 415 U.S. 143). We contend simply that the rule should be no different when one of the participants is a person, other than the principal target, who was known but not identified.

The court below held instead that each and every person who the government has probable cause to believe will use the intercepted telephone for illegal purposes must be named in the application and order and, further, that a failure so to name any such person warrants suppression as to him of his intercepted conversations.

2. The decision below creates serious practical difficulties for law enforcement. While it is easy to state the requirement that a person must be identified whenever the government has probable cause to believe that his conversations relating to the offense being investigated will be intercepted, it is far more difficult to apply that standard.

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[8] Congress protected the rights of users of the monitored telephones by providing for minimization of the interception of conversations not relating to the offense under investigation (18 U.S.C. 2518(5)). That is, the limitation is drawn on the basis of the *types* of conversations to be intercepted, rather than of the identity of the participants in the conversations.

The facts of this case demonstrate that difficulty. The draft of the affidavit to accompany the application for the original interception authorization, prepared by the FBI agent in charge of this case, did name respondent Bernstein, because the agent concluded that there was probable cause to believe Bernstein would be overheard (C.A. App. 429, 431). When the proposed affidavit was reviewed in Washington, however, Bernstein's name was stricken on the ground that the information concerning him was stale (C.A. App. 421). Since the agent was thereafter unable to obtain sufficient additional information concerning Bernstein's participation, his name was omitted from the original application submitted to the district court and from the March 30 order based thereon (C.A. App. 342). The district court, in considering the suppression motion, agreed that there had been insufficient probable cause to believe that Bernstein would discuss the gambling operation on the intercepted phones to justify naming him in the March 30 application and order (App. E, *infra*, p. 42a).

The target telephones were monitored pursuant to the March 30 order from April 1 until April 14, when an extension order was issued. Although 48 gambling conversations were intercepted during the first 10 days, none of them involved Bernstein, the suspected "layoff man" [9] (C.A. App. 51). Although a numbers

[9] In order to avoid high losses in a gambling operation when too much money is bet on a given chance, some of the bets are transferred to someone else. These bets are said to be "laid off," and the transferee is known as the "layoff man" (App. E, *infra*, p. 40a, n. 1).

bookmaker ordinarily is in daily communication with his "layoff man," Bernstein did not talk to Curreri on a target phone until April 11 at about 5:17 p.m.[10] Moreover, the conversation related not to layoffs but to Curreri's anger at having paid off on an incorrect number the day before and to procedures designed to avoid a recurrence of that mistake. Bernstein told Curreri that he had told someone else to report the error to Curreri, but promised that in the future in such cases "anytime I find it out, if it's four o'clock in the morning, I'll call" (App. F, *infra*, p. 58a).

This telephone call indicated that Bernstein ordinarily told others to make calls, rather than doing so himself; he did promise to call if he should discover again that an incorrect number had been reported. The total interception between April 1 and 14 indicated that if Bernstein was Curreri's "lay-off man," he operated in a manner that avoided his use of the target phone lines. Nevertheless, on the basis of this single call, the courts below found (App. A, *infra*, p. 14a; App. E, *infra*, pp. 43a-45a) that when the application for the April 14 order was prepared, there was probable cause to believe Bernstein would thereafter be intercepted using the target phones to discuss gambling, and thus that he should have been named in the extension application.

The facts of this case thus illustrate the fine questions of judgment that investigating agents will face if they must determine whether a court will later hold that there was probable cause to identify persons

[10] This conversation is reproduced in Appendix F, *infra*.

other than the primary target in interception applications.[11] Moreover, these questions are likely to arise, as they did here, in the course of complex and fast moving investigations. Here, more than 30 individuals, identified in their conversations only by code names or nicknames, were overheard in 49 gambling-related conversations in the first 10 days of the interception (C.A. App. 51, 66).[12] The crucial call was overheard on April 11th, and the extension order was granted April 14th.

It is in this context that the court below would require the application to identify, on the basis of the probable cause standard, every person whose illegal conversations may be expected to be overheard. This requirement is not, moreover, confined to those whose phones are being monitored, but extends to any person anywhere in the world who may be expected to use an unmonitored phone to place a call to the target phone. And the penalty for a determi-

[11] The precise conclusion of the court of appeals was that "[a] detached observer could conclude from the evidence available before April 14 that the government had probable cause * * *" (App. A, *infra*, p. 15a). While that may be true, the practical problem arises because a detached observer could also reach the oposite conclusion, and the agent must guess which alternative will eventually seem more reasonable to a reviewing court.

[12] In 1974, an average of 48 persons were overheard as a result of each electronic surveillance order obtained by the federal government. Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications, January 1, 1974 to December 31, 1974, Administrative Office of the United States Courts, Table 4, p. X.

nation that probable cause is lacking, if that determination is later held to be incorrect, is the suppression of evidence of wrongdoing that may be necessary for a conviction. Moreover, the evidence is to be suppressed even though the interception was in all other respects lawful and the conversations can permissibly be used as evidence against the other participants therein.

In contrast, the statute requires only the identification of a single "person, if known, committing the offense, and whose communications are to be intercepted" (18 U.S.C. 2518(1)(b)(iv))—here, Curreri.[13] The decision below thus distorts the language of the statute in a way that will strongly encourage the naming in applications for interception orders of all persons who may eventually be overheard—at least wherever there is any possibility that some court will in the future determine that there was probable cause to believe such interception would occur. Even this approach is not without risk, however, for at least one court has suggested that the improper naming of a person in an interception order may justify the suppression of his intercepted conversations. *United*

[13] Moreover, the "if known" qualification suggests that actual knowledge, not probable cause, is the intended standard. Where the government has actual knowledge of the identity of the target of the electronic surveillance, but fails to identify anyone in the application and order, that omission would be a conscious disregard for the requirements of the statute and could be a violation warranting suppression. Cf. *United States* v. *Eastman*, 465 F.2d 1057, 1062 (C.A. 3); *United States* v. *Wolk*, 466 F.2d 1143, 1146 (C.A. 8).

States v. *Tortorello*, 480 F.2d 764, 775-776 (C.A. 2), certiorari denied, 414 U.S. 866.[14]

3. Not only will the principle espoused in the decision below create grave practical problems in the administration of the law governing wire interceptions, but it will serve no significant compensating policy objectives.

(a) It is far from clear that identification in doubtful cases is a desirable policy, even from the point of view of those who will be named. Being named in an application and order may subject an individual to adverse publicity when the order is unsealed, see *United States* v. *Kahn*, *supra*, 415 U.S. at 153.[15]

(b) The naming requirement of Sections 2518(1)(b)(iv) cannot reasonably be read as designed to protect the privacy of persons whose conversations may be intercepted, since it is equally proper to intercept the illegal conversations either of persons named in the order or of persons who were not named because they were not known to be using the target

[14] Nor is it clear what, if any, consequences would result from a judge's failure or refusal to name in the order a person identified in the application.

[15] As the court below notes, naming an individual in the application and the order does mean that he will receive formal notice that his conversations were intercepted (App. A, *infra*, p. 9a). But even unnamed persons must be notified if the judge determines that the interests of justice require it (18 U.S.C. 2518(8)(d)). In any event, once the named target of the interception is notified, it is unlikely that his co-conspirators will long remain ignorant of the interception.

phones for illegal purposes (*United States* v. *Kahn*, *supra*, 415 U.S. at 152-153). Instead, Congress protected the right of privacy of all those using the target phones by providing that the interception of innocent conversations must be minimized (18 U.S.C. 2518(5)).

No rational policy is served by suppressing only the conversations of those concerning whom there is some pre-existing evidence of illegal use of the target phones; the privacy interests of such persons are entitled to no greater protection than those of persons who are not known to be using the target phones illegally. Indeed, as the district court noted, such a result penalizes the government for careful pre-authorization investigation (App. E, *infra*, p. 45a, n. 2).

(c) The court of appeals identified three purposes to be served by the statutory identification provisions: (i) adequate executive review of electronic surveillance applications; (ii) informed judicial control over the use of electronic surveillance; and (iii) comprehensive judicial review of such surveillance (App. A, *infra*, pp. 7a-11a). But none of these purposes is directly or substantially promoted by requiring the identification of persons who are not the principal target of the investigation. Cf. *United States* v. *Giordano*, *supra*, 416 U.S. at 527.

(i) It is highly unlikely that the Attorney General or the specially designated Assistant Attorney General will be familiar with the names included in proposed wire interception applications. Even in the

few cases in which the names would be recognized, the authorizing official will be properly concerned not with the identities of those involved, but with the seriousness of the offense, the existence of probable cause, and the necessity for the use of electronic surveillance. Here, for example, the application and affidavit for the original and the extension orders each adequately informed the authorizing officer of these considerations; it cannot seriously be contended that information concerning Bernstein's suspected participation in any way affected the decision to authorize the original application or that further knowledge of his participation would have affected the decision to apply for an extension of that order.

(ii) The congressional intent to have the issuing judge provided with any prior history of electronic surveillance of the named persons is adequately protected where the principal target of a proposed interception is named, as was the case here. Prior electronic surveillance of persons who might incidentally be overheard conversing with the named target would ordinarily be of no substantial interest to the judge reviewing the application.[16]

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[16] Of course, in a case where the government omitted from the application, intentionally and with the intent to deceive the issuing judge, the identity of a person who was the real target, so that the government would not have to list prior interception history of that person, suppression might be appropriate. Cf. *United States* v. *Bellosi*, 501 F.2d 833 (C.A. D.C.). In the instant case, Bernstein's identity was not omitted for any improper purpose.

(iii) Subsequent judicial review of wire interceptions is guaranteed fully by the identification of the targets of the interception, who must receive statutory inventory notice. 18 U.S.C. 2518(8)(d). Indeed, the purpose of the notice is to make sure that "all authorized interceptions must eventually become known at least to the subject." S. Rep. No. 1097, 90th Cong., 2d Sess., p. 105 (1968). In the instant case, the persons named in the order received the inventory notice required by the statute (C.A. App. 148); respondent, who was not named, received sufficient actual notice to permit him to litigate his motions to suppress. It is hardly likely that the fact that he was not named in the order significantly delayed his realization that his conversations had been intercepted (see note 14, *supra*).

4. The court below relied on a dictum in *United States* v. *Kahn*, *supra*, 415 U.S. at 155, in concluding that probable cause is the standard to be applied in determining whether the government must identify a person whose conversations may be overheard. But in *Kahn* the issue was whether identification was necessary in the absence of knowledge of the individual's participation in the illegal activity. This Court concluded that it was not. The dictum upon which the court below relied, taken in context, indicates no more than that in the *absence* of probable cause to believe that a person is involved in the illegal activity, there is no need to identify him. It by no means follows that all persons as to whom there *is* probable cause must be identified; that question was

simply not before the Court in *Kahn*. It is presented for the first time here.

5. The court below also misapplied *United States* v. *Giordano*, 416 U.S. 505, in concluding that the identification requirement was a "statutory precondition to a valid intercept order, and failure to identify renders an interception contrary to law and invalid as to that person" (App. A, *infra*, p. 11a). For the reasons noted above, we believe the court erred in concluding that the statute requires the identification of all those who the government has probable cause to believe will participate in conversations over the target phone for the identified illegal purpose. But even assuming, *arguendo*, that our interpretation is incorrect, the identification requirement is hardly a provision the violation of which warrants suppression.

Giordano and *United States* v. *Chavez*, 416 U.S. 562, teach that suppression is required only when the provision violated is one which "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for [them]," *Giordano*, *supra*, 416 U.S. at 527.

In contrast to *Giordano*, there is no suggestion here that the interception was itself improper. The failure to identify respondent clearly had no effect either on the decision to issue the intercept order or on effective judicial review of its implementation. Nor could such a failure reasonably be expected to have such an effect in future cases (see *supra*, pp. 15-17).

It is particularly evident that the violation, if any, is merely technical where, as here, the suppressed conversations are with the named target. In such a case, the government has an unquestioned right, by virtue of the intercept order, to overhear the conversation;[17] thus, no substantial rights of the unidentified participant have been violated, and suppression is wholly inappropriate. Cf. *United States* v. *Chavez*, *supra*; *Smith* v. *United States*, 360 U.S. 1, 9.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MAY 1975.

[17] If the government had listened to these conversations after receiving Curreri's permission to overhear them, Bernstein could not have complained, 18 U.S.C. 2511(2)(d); *United States* v. *White*, 401 U.S. 745; *Hoffa* v. *United States*, 385 U.S. 293. Bernstein's grounds for complaining about the invasion of his privacy are even weaker here, where the government had the authorization of a district court to overhear Curreri's conversations.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1066

UNITED STATES OF AMERICA, APPELLANT

—*v*—

CALMAN BERNSTEIN, APPELLEE

Appeal from the United States District Court for the District of Maryland, at Baltimore. C. Stanley Blair, District Judge.

(Argued September 30, 1974
Decided January 24, 1975)

Before CRAVEN, BUTZNER, and FIELD, Circuit Judges.

BUTZNER, Circuit Judge:

The United States appeals from a district court order that suppressed Calman Bernstein's intercepted

phone calls as evidence against him. The court found that when the government applied for the intercept order extensions, under which the conversations were later seized, its agents knew that Bernstein was committing the crime under investigation and would use the telephone they sought to tap. Because Bernstein was not identified in either the applications or the extensions, in violation of Title III of the Omnibus Crime Control and Safe Streets Act, the court suppressed the conversations. Its opinions are reported as United States v. Curreri, 368 F.Supp. 757 (D. Md. 1973), and United States v. Bleau, 363 F.Supp. 438 (D. Md. 1973).

The wiretaps were part of an investigation of numbers bookmaking. The first intercept order was obtained on March 30, 1972, and extensions were granted on April 14, May 1, and May 17. After Bernstein and others were indicted for conducting an illegal gambling business, he moved to suppress conversations seized under both the original order and the extensions. The district court found that although government agents had probable cause to believe that Bernstein was involved in the business before they applied for the March 30 order, they did not know that he would use the tapped telephones. Consequently, it denied Bernstein's motion to suppress the conversations obtained by the first interception. Bernstein has not appealed this order.

The court then found that before the agents applied for the April 14 extension order, information from the first interception had given them probable

cause to believe that Bernstein would be overheard on a tapped telephone. Their failure to identify him in that and subsequent applications, it held, rendered the interceptions obtained after April 14 unlawful with respect to him. Accordingly, the court suppressed them. We affirm.

I

The application for a wiretap order must include "a full and complete statement of the facts and circumstances relied on by the applicant to justify his belief that an order should be issued, including . . . the identity of the person, if known, committing the offense and whose communications are to be intercepted." [1] Extensions of an intercept order require

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[1] 18 U.S.C. § 2518 provides:

"(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

. . .

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted. . . ."

a new application containing the same information needed for the original one.[2] The order must specify "the identity of the person, if known, whose communications are to be intercepted."[3] Since it is only through the application that the judge learns the identity of the person whose conversations are to be intercepted, the identification requirement for the order is no broader than for the application. United States v. Kahn, 415 U.S. 143, 152 (1974). The critical issue in this case, therefore, is whether the omission from a wiretap application of the name of a known offender whose communications are to be overheard dictates suppressing his conversations as unlawfully intercepted when the government proposes to use them against him.[4]

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[2] 18 U.S.C. § 2518(5) provides in pertinent part:

". . . Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section . . ."

[3] 18 U.S.C. § 2518(4)(a).

[4] 18 U.S.C. § 2518(10)(a) provides:

"Any aggrieved person in any trial . . . in or before any court . . . of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted.

. . . .

If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter."

[Footnote continued on page 5a]

Not every violation of Title III results in an unlawful interception. A violation is material only if Congress intended the statutory provision that was not followed to be "a precondition to obtaining . . . intercept authority." United States v. Giordano, 416 U.S. 505, 515 (1974).[5] Statutory preconditions, teaches the Court, "directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 416 U.S. at 527. In contrast, violation of a statutory provision that does not "affect the fulfillment of any of the reviewing or approval functions required by Congress," does not render an interception unlawful within the meaning of § 2518(10)(a)(i). United States v. Chavez, 416 U.S. 562, 575 (1974).[6] Whether a statutory provision is a

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[4] [Continued]

18 U.S.C. § 2515 provides:

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received . . . in any trial . . . if the disclosure of that information would be in violaton of this chapter."

18 U.S.C. § 2517(3) allows intercepted communications to be used as evidence only if obtained "by any means authorized by this chapter."

[5] In *Giordano* the Court affirmed suppression because the Attorney General or a designated Assistant Attorney General failed to review and approve the application for an intercept order, in violation of 18 U.S.C. § 2516(1).

[6] *Chavez* held that application's misnomer of the authorizing Assistant Attorney General, in violation of 18 U.S.C. § 2518(1)(a), did not require suppression.

precondition to a valid order depends, then, on its role in the Act's system of restraints on electronic surveillance.

Title III was drafted to protect the privacy of wire and oral communications while allowing the use of electronic surveillance in the investigation of certain crimes. It restricts eavesdropping by law enforcement officers to conform to the fourth amendment and to prevent abuse even of constitutional surveillance. The government contends that the identification requirement serves neither end and that its violation is a mere technical omission. But when the entire statute is considered, identification is seen to facilitate both constitutional and congressional limits on eavesdropping.

Electronic interception of communication is a form of search and seizure subject to the fourth amendment. Unless a party to the conversation consents, the amendment only permits interceptions with prior judicial approval to gather information about a specific crime for a limited time from a particular place. Therefore, the amendment prohibits eavesdropping to collect general intelligence about individuals. *See generally* United States v. United States District Court, 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967). Several provisions of Title III directly implement these restrictions.[7] Though dic-

[7] *E.g.*, 18 U.S.C. §§ 2518(3) (judicial finding of probable cause that evidence of specific crime can be gathered from specific place), 2518(5) (limitations on time and scope).

tum in United States v. Kahn, 415 U.S. 143, 155 n.15 (1974), indicates that the fourth amendment might not require naming a known offender whose conversations are to be intercepted,[8] identification nevertheless fosters conformity with both constitutional and statutory requirements. In particular, it is important to the exercise of (A) executive approval, (B) prior judicial authorization, and (C) subsequent judicial review of interceptions.

A

In order to allow only necessary electronic surveillance, Congress imposed preconditions not required by the Constitution, including restriction of federal authority to request intercept orders to the Attorney General or a designated Assistant Atorney General. 18 U.S.C. § 2516(1); Unied States v. Giordano, 416 U.S. 505 (1974). When deciding whether to approve surveillance, however, the Attorney General depends on information from law enforcement officials. If his subordinates do not identify known persons whose conversations they wish to intercept, they effectively substitute their judgment for his. It is therefore

[8] *But see* West v. Cabell, 153 U.S. 78 (1894). This case, cited in the legislative history of § 2518(4)(a), S. Rep. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. and Admin. News 2191, held that both the common law and the fourth amendment required that the person to be seized under an *arrest* warrant should be accurately named. Since the other information demanded in § 2518(1)(b) is required by the fourth amendment, Congress may have believed that identification of the person speaking is also constitutionally required.

apparent that identification, as required by § 2518(1)(b)(iv), is essential to the discharge of responsibility which the Act places on the Attorney General or his designate.[9]

B

Both the fourth amendment and Title III require prior judicial authorization of electronic eavesdropping in order to forestall abuses by enforcement officials. 18 U.S.C. §§ 2511, 2518(3); United States v. United States District Court, 407 U.S. 297 (1972); Katz v. United States, 389 U.S. 347 (1967). Issuing an intercept order is not simply a ministerial act, for the judge must decide that the constitutional and statutory justifications for the intrusion exist. So that the judge can be as informed as possible in an *ex parte* hearing, Congress required the applicant for an intercept order to furnish the necessary facts in considerable detail. *See* 18 U.S.C. § 2518(1); *cf.* Spinelli v. United States, 393 U.S. 410 (1969).

Included in the information the government must furnish is a complete history of the electronic surveillance of the persons named in the application.[10]

[9] The fact that an application for an extension is involved in this case is not significant. The Acting Attorney General separately authorized the April 14th extension and, on the recommendation of an Assistant Attorney General, approved the addition of names not included in the original application. Bernstein's name, however, was not mentioned.

[10] 18 U.S.C. § 2518(1)(e) requires:

> "A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application. . . ."

Omission of this information is a statutory violation that invalidates any interceptions with respect to the persons not listed. United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974). As that case explains, Congress believed that information about prior surveillance is "necessary to judicial consideration of whether the proposed intrusion on privacy is justified by important crime control needs." 501 F.2d at 837. But a history of prior taps involving the same person is available to the court only when he is named in the application. Identification required by the Act, therefore, facilitates judicial control by providing the complete history that Congress deemed necessary for an informed decision.

C

In Berger v. New York, 388 U.S. 41, 60 (1967), the Supreme Court held that notice of a search is an essential element of judicial control over the execution of intercept orders. Secrecy, it reasoned, could make vindication of fourth amendment rights impossible, especially when the government did not intend to use the intercepted conversations as evidence. Conforming to the Constitution, Title III requires service of notice on "the persons named in that order or the application, and such other parties to inter-

cepted communications as the judge may determine," informing them that an interception was applied for and either denied or carried out. 18 U.S.C. § 2518(8)(d). This notice, the legislative history explains, "should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known *at least to the subject.* He can then seek appropriate civil redress . . . if he feels that his privacy has been unlawfully invaded." [Italics added.] S. Rep. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. and Admin. News 2194.[11]

Unless the government uses the intercepts as evidence against him, an unnamed subject has no assurance that he will receive notice, and the government may secretly circulate unlawfully intercepted conversations to other law enforcement agencies and use them in its own operations.[12] Post-interception judicial review in an adversary hearing, an essential part of Title III's remedial scheme, cannot be had without notice to the person overheard. When the government expects to listen to a known offender, it has the statutory duty to name him in the application so that he will receive the notice to which he is entitled. Failure to do so can obstruct judicial review

[11] 18 U.S.C. § 2520 provides a civil remedy for violations of Title III.

[12] If the intercepts are used as evidence, the government must give notice at least ten days before trial. 18 U.S.C. § 2518(9).

of the government's actions and thwart the congressional policy of protecting the individual's privacy.

In conclusion, the Act's identification requirements form an integral part of the system Congress created to protect privacy by executive and judicial control of electronic surveillance. Identification of known persons, as required by § 2518(1)(b)(iv), is therefore a statutory precondition to a valid intercept order, and failure to identify renders an interception contrary to law and invalid as to that person. 18 U.S.C. §§ 2518(10)(i), 2515; *cf.* United States v. Giordano, 416 U.S. 505 (1974).

II

We next consider whether Bernstein was "known" within the meaning of § 2518(1)(b)(iv), which requires the application for an intercept order to include "the identity of the person, if known, committing the offense and whose communications are to be intercepted." The problem consists of three parts: what information does the statute require; how certain must the applicant be about this information; and whether the district court correctly assessed the applicants' knowledge when they applied for the April 14th extension.

We agree with the district court that § 2518(1)(b)(iv) imposes no duty of identification until the applicant knows both that the individual "is committing the offense" and that his "communications are to be intercepted." The Supreme Court settled

the first point in United States v. Kahn, 415 U.S. 143, 156-7 (1974). Its opinion supports the second by implication, for if the government has no knowledge that a certain person will be overheard on the tapped phone, it cannot intend to invade his privacy and would serve no statutory purpose by identifying him. *See* United States v. Martinez, 498 F.2d 464, 468 (6th Cir. 1974).

How positive of the relevant facts must the government's agents be? The government maintains that it must name the person only when its knowledge approaches certainty. Bernstein contends that the government must identify the subject of an interception when its knowledge supports a finding of probable cause of his criminal activities and use of the phone to be tapped.

Again, *Kahn* provides guidance by indicating that probable cause is sufficient knowledge.[13] The Court's observation, though dictum, is consistent with the historical use of this test to evaluate other invasions of privacy. *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Sibron v. New York, 392 U.S. 40 (1968). The probable cause standard is a well tried compromise between the interests of per-

[13] In United States v. Kahn, 415 U.S. 143, 155 (1974), the Court stated that:

> "Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is 'committing the offense' for which the wiretap is sought."

sonal privacy and effective law enforcement. *See* Brinegar v. United States, 338 U.S. 160, 176 (1949). Examination of the evidence by a neutral, objective judicial officer provides a more uniform and certain measure of the investigator's knowledge than his own subjective judgment. *See* Johnson v. United States, 333 U.S. 10, 13-14 (1948). We therefore hold that when there is probable cause to believe that an individual is committing a specific crime and may be overheard on a specific phone, he is known to the government for the purpose of § 2518(1)(b)(iv).

We next consider whether the district court correctly found that the F.B.I. had probable cause to believe Bernstein was participating in the activity under investigation and would use a phone covered by the extension of the intercept order. Since the district judge's opinion sets forth the facts in meticulous detail, only a brief resume of the evidence is necessary for our purposes. *See* United States v. Curreri, 368 F.Supp. 757, 761 (D. Md. 1973).

Before the government applied for its initial intercept order on March 30, F.B.I. agents investigating Robert Curreri, a bookmaker whose telephones they wished to tap, learned from two informants of proven reliability that Bernstein was handling Curreri's layoff.[14] Baltimore police also told agents that

[14] A bookmaker must diminish his risks by re-betting, or "laying off," large bets with another bookmaker. The person who takes layoff bets is an integral part of a bookmaking business. United States v. Bobo, 477 F.2d 974, 990 (4th Cir. 1973).

Bernstein was reputedly involved in gambling. It is apparent the district court correctly found that from this information the agents had probable cause to believe Bernstein was part of an illegal gambling business. Indeed, the government now concedes this point.[15] But not until Curreri's phones were actually tapped did the F.B.I. learn that Bernstein would use one of them to discuss gambling with Curreri. On April 11, 1972, agents monitored a call on one of Curreri's phones from a man whom they were able to identify as Bernstein. Initially, an unidentified man told Bernstein that Curreri was busy. When Bernstein gave his name and said that he had a message to call, he was told to hold on because Curreri wanted to speak to him. Curreri and Bernstein then discussed a payoff on a wrong number the previous day and ways to avoid the same mistake in the future. During the conversation Bernstein said that he had told his girl to "call everybody" when he had learned of the mistake and that he had called Curreri's mother once before about a similar problem. Curreri then instructed Bernstein to give his girl Curreri's number, saying, "I'm either here or home or someplace." Bernstein reassured Curreri that anytime a wrong number was reported, "If it's four o'clock in the morning, I'll call." The transcript ends with Bernstein saying, "I'll talk to you later," and

[15] "There is no question but that the government had probable cause to believe that Bernstein was a member of Curreri's gambling operation . . ." Reply Brief for the United States 5.

Curreri responding, "O.K., Cal." The government mentioned neither Bernstein nor this call in its April 14th application.

Taken as a whole, the evidence supports the district court's finding. F.B.I. agents already had probable cause to believe Bernstein was involved in Curreri's operation. The April 11th conversation, which referred to payments between the two men, confirmed this and also showed that Bernstein phoned Curreri. A detached observer could conclude from the evidence available before April 14 that the government had probable cause to believe that Bernstein was still handling Curreri's layoff and on occasion would talk with him about the business on a tapped phone. *Cf.* United States v. Kleve, 465 F.2d 187, 193 (8th Cir. 1972).

III

The government contends that even if it violated § 2518(1)(b)(iv) with respect to Bernstein, § 2517(3) authorizes the use of the taps as evidence against him.[16] Briefly, the government argues that the communications between Bernstein and Curreri include

[16] 18 U.S.C. § 2517(3) provides:

> "Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of any State or in any Federal or State grand jury proceeding."

both sides of the conversation; that a valid order covered Curreri; and that once lawfully intercepted, Bernstein's conversations could be used against anyone, including Bernstein himself.

The fundamental error in the government's position is the assumption that Title III provides only a right not to have the unlawful intercepts used in court. But Title III does more: it creates a right not to be overheard except in conformity with its provisions. 18 U.S.C. § 2511(1).[17] As we held in part I of this opinion, the identification required by § 2518(1)(b)(iv) is a precondition to lawful interception with respect to a known person. Therefore, contrary to the government's assertion, § 2517(3) supplies no basis for admission since by its terms it applies only to "communications intercepted in accordance with this chapter."

The government compares this case, however, to one where an independent ground for a search, such as a valid arrest, renders a defective warrant, or the absence of a warrant, immaterial. We find the analogy unpersuasive. A warrantless search incident to a lawful arrest is valid because the occasion requires the contemporaneous removal of weapons or dispos-

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[17] 18 U.S.C. § 2511(1) provides in pertinent part:

"(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . ."

shall be subject to criminal penalties.

able evidence from the prisoner and the area under his immediate control. United States v. Robinson, 414 U.S. 218 (1973). Similar exigent circumstances are lacking when agents tap a phone with probable cause to believe that they will overhear a particular person talking about specific criminal activity.

Nor can the government rely on a comparison to the plain view doctrine. The seizure of evidence in plain view is justified only when discovery is inadvertent. Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971). The government's position finds no support in United States v. Kahn, 415 U.S. 143 (1974). Mrs. Kahn's conversations were lawfully intercepted because the government had no reason to suspect her criminal activities when the agents overheard her. Here, in contrast, the agents had reason to anticipate Bernstein's use of a tapped phone to discuss his participation in the crime they were investigating, and they intended to intercept his calls. The conversations suppressed by the district court were not inadvertently discovered.

We conclude, therefore, that when the government has the statutory duty to identify an individual, its failure to do so is not excused by the fact that it lawfully eavesdropped on another party to the conversation.

IV

Bernstein did not receive statutory notice of the wiretaps in which his conversations were intercepted. The government argues that because he later re-

ceived actual notice he was not prejudiced, and consequently his conversations are admissible.

Suppression, however, does not depend on proof of prejudice from lack of statutory notice. Congress defined an aggrieved person as "a party to any intercepted wire or oral communication or a person against whom the interception was directed." [18] Prejudice is not an element of the definition. Furthermore, the statute gives the district court no discretion to deny, because of lack of prejudice, an aggrieved person's motion to suppress when the interception is unlawful.[19] We conclude from the unequivocal language of Title III that Congress intended any unlawful invasion of an aggrieved person's privacy to be sufficient harm in itself to require suppression. *Cf.* United States v. Giordano, 416 U.S. 505, 524-29 (1974).

The order of the district court is affirmed.

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[18] 18 U.S.C. § 2510(11).

[19] See footnote 4 *supra.*

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1066

[Filed Jan. 24, 1975, William K. Slate, II, Clerk]

UNITED STATES OF AMERICA, APPELLANT,

vs.

CALMAN BERNSTEIN, APPELLEE.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate, II
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1066

[Filed Mar. 28, 1975, William K. Slate, II, Clerk]

UNITED STATES OF AMERICA, APPELLANT

versus

CALMAN BERNSTEIN, APPELLEE

ORDER

Upon consideration of the petition for rehearing and suggestion for rehearing en banc, by counsel,

It is, therefore, ORDERED, That the petition for rehearing and the suggestion for rehearing en banc be and it is hereby denied.

For the Court—By Direction.

/s/ William K. Slate, II
Clerk

[SEAL]

A True Copy, Teste:
WILLIAM K. SLATE, II, Clerk

By /s/ F. Chlorie
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
D. MARYLAND

Crim. No. 72-0434

UNITED STATES OF AMERICA

v.

PATRICIA ANN BLEAU ET AL.

July 11, 1973

* * * *

MEMORANDUM AND ORDER

BLAIR, District Judge.

Calman Bernstein, a defendant in this prosecution under 18 U.S.C. § 1955 for alleged gambling activities, has moved for the suppression of wiretap evidence obtained under an authorization order entered on April 14, 1972. Bernstein claims that, at the time the April 14 order was obtained, the government knew of his alleged involvement in the gambling activities and use of the communication facilities to be monitored and, for this reason, his name was required to be listed in the application seeking and the order authorizing the wiretap. Since it was not, he argues, suppression of all evidence against him secured through the use of the April 14 wiretap must occur.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereafter Title III), 18 U.S.C. § 2510 et seq., imposes a qualified requirement that a party whose conversations are to be intercepted be named in the application and order. Section 2518 (1)(b)(iv) requires a listing in the wiretap application of "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518(4)(a) similarly requires that the authorization order list "the identity of the person, if known, whose communications are to be intercepted." These provisions, among others, are designed to insure that the authorizing judge's order —i. e., the warrant—will be adequately particularized according to Fourth Amendment standards as enunciated in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *See*, Senate Report No. 1097, 1968 U.S.Code Congressional and Administrative News, 2112, 2189-90. They are also keyed to Title III's notice provisions—an integral part of the statute—in that those named in the order receive an inventory as a matter of right while others whose communications are intercepted in the course of the wiretap receive an inventory only in the discretion of the authorizing judge. 18 U.S.C. § 2518(8)(d).

[1-3] The listing in the warrant of the name of the owner of the premises to be searched or the things to be seized is not specifically required by the Fourth Amendment, which provides that "no Warrants shall issue, but upon . . . particularly describing the place to be searched, and the person or things to be seized." Hanger v. United States, 398 F.2d 91, 99 (8th Cir. 1968), cert. denied, 393 U.S. 1119, 89 S.Ct. 995, 22 L.Ed.2d 124 (1969); Miller v. Sigler, 353 F.2d 424, 428 (8th Cir. 1965), cert. denied, 384 U.S. 980, 86 S.Ct. 1879, 16 L.Ed.2d 690 (1966); Dixon v. United States, 211 F.2d 547, 549 (5th Cir. 1954); United States v. McClard, 333 F.Supp. 158, 163 (E.D.Ark. 1971), aff'd, 462 F.2d 488 (8th Cir. 1972); United States v. Ortiz, 311 F.Supp. 880, 883 (D.C.Colo. 1970), aff'd, 445 F.2d 1100 (10th Cir. 1971), cert. denied, 404 U.S. 993, 92 S.Ct. 541, 30 L.Ed.2d 545 (1971). All that need be particularly described for Fourth Amendment compliance is the place to be searched and the thing or person to be seized.[1] *See* Berger v. New York, 388 U.S. 41, 58-59, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), where failure to particularize in this respect invalidated the New York statute despite the statute's requirement that the speaker be named whose conversations were to be intercepted. In regard to telephone communi-

[1] Property not actually described in the search warrant may still be seized if reasonably related to the purpose of the search. Taylor v. State of Minnesota, 466 F.2d 1119, 1121 (8th Cir. 1972); Louie v. United States, 426 F.2d 1398-1402 (5th Cir. 1970), cert. denied, 400 U.S. 918, 91 S.Ct. 180, 27 L.Ed.2d 158 (1970). *Contra*, if the officers obtaining the warrant knew of the property's existence, intended to seize it, but failed to have it listed on the warrant. Coolidge v. New Hampshire, 403 U.S. 443, 470-471. 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); United States v. Carney, 356 F.Supp. 855, 858 (M.D.Tenn. 1973).

cations it thus appears that under the Fourth Amendment it is possible to seize particularly described conversations from a particularly described place without naming the speaker in the warrant. United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972); United States v. King, 335 F.Supp. 523, 538-540 (S.D.Cal. 1971); United States v. Perillo, 333 F. Supp. 914, 921 (D.Del. 1971); United States v. Sklaroff, 323 F.Supp. 296, 324-325 (S.D.Fla. 1971). Of course, naming the speaker further particularizes the description of the conversations to be seized and would reinforce an otherwise detailed description of the conversation. *See, e. g.*, Katz v. United States, 389 U.S. 347, 354, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). To this end, in the effort to particularize to the greatest degree possible, Title III requires that the speaker be identified, but only upon a condition of reasonableness that the speaker be named "if known." On the other hand, if only by implication, if the speaker's identity is now known, conversations of the type and from the place particularly described can still be seized. Because the Fourth Amendment does not demand an owner's name be in a search warrant otherwise properly descriptive, a failure to name an individual could only be violative of Title III's requirements and not those of the Fourth Amendment. If suppression is proper, it would be the result of a failure to comply with Title III rather than the Fourth Amendment.

Since Title III requires the naming only of those who are known, it must be determined who fits into

the class of knowns, and who, in the unknowns. In United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), cert. granted, 411 U.S. 980, 93 S.Ct. 2275, 36 L.Ed.2d 956 (1973), a decision defendant pillars his position upon, the Seventh Circuit tightly contracted the category of "unknowns." In that case, the government, under an order authorizing the tapping of gambling conversations between Irving Kahn and "others as yet unknown", intercepted gambling conversations between Irving Kahn and his wife, Minnie, whom the government did not know until that time was involved in her husband's illegal activities. Subsequently, two gambling calls between Minnie and known gambling figures were intercepted. The Seventh Circuit affirmed the suppression of Minnie Kahn's conversations on the ground that she did not fit into the class of persons "as yet unknown" and, not being named in the order, there was no authority to intercept her communications. The court stated that when the government can discover by a prudent investigation the names of all persons involved and whose conversations will be tapped, those persons must be named in the order if the government wants to tap their conversations. The court looked at the affidavit in the file in the wiretap proceeding and decided the government could have pursued other conventional avenues of investigation to determine Minnie Kahn's complicity in her husband's activities before submitting the wiretap application, but had not done so. The court noted that the government must demonstrate that other investigative techniques to discover

an unnamed person's identity had been tried and failed and that the government could not rely on the conclusionary statement in the application that "normal investigative methods reasonably appear to be unlikely to succeed and are too dangerous to be used" as an excuse or justification for not having known of Minnie Kahn's gambling activities and obtaining her name in the authorization order.

Judge Stevens dissented. He reasoned that Congress intended to permit conversations of persons unknown to the government at the time of the application for the wiretap order to be intercepted and that the order in this case so provided. Since nothing in the record indicated the government had knowledge of Minnie Kahn's involvement, she properly fit in the class of "unknowns." He felt the adequacy of the government's investigation was irrelevant to the requirement of listing names and pertained only to Section 2518(3)(c) which required the authorizing judge to make a finding that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Since the authorizing judge had, in Judge Stevens' view, justifiably found that other means of investigation were inadequate or too dangerous, the government had to investigate by conventional means no further to intercept the conversations of people like Minnie Kahn, not known to the government at the time of the application.

[4, 5] Having considered both positions expressed in *Kahn*, this court is persuaded that Judge Stevens

is correct. Sections 2518(1)(c) and 2518(3)(c), and not Sections 2518(1)(b)(4) and 2518(4)(a), impose the exhaustion of conventional investigative techniques requirement on the government. These sections do not require the government to try and fail at every conceivable other avenue of investigation before a Title III wiretap can be obtained. United States v. Lanza, 356 F.Supp. 27, 30 (M.D.Fla. 1973). They permit a Title III interception if the authorizing judge finds other investigative techniques are either too dangerous to try or are unlikely to succeed if tried. *See, e. g.*, United States v. Bobo, 477 F.2d 974 et seq. (4th Cir. 1973), where the Fourth Circuit approved the authorization of a Title III wiretap upon the conclusion by the authorizing judge "that normal investigative procedures reasonably appear unlikely to succeed." If the authorizing judge finds one or the other, he can then approve the wiretap whether the government has the theoretical capability of using other investigative means or not. *See*, Senate Report No. 1097, 1968 U.S. Code Congressional and Administrative News, 2112, 2190. The majority opinion in *Kahn* ignores these sections of the statute and, in this court's mind, imposes a limit on the government not justified by the language of Title III or the Fourth Amendment.

[6] Before there is a need for the wiretap order to specifically list a person whose conversations are to be intercepted, the government must, at the time the order is applied for, have probable cause to believe that person is involved in the criminal activity

the wiretap seeks to monitor and is a user of the communication facility for that illegal purpose. Probable cause must exist for the government to know both the involvement and likely use, for one without the other does not mandate a naming in the order. Furthermore, the government must have probable cause to believe the involvement and use; mere suspicion is not sufficient. Otherwise, if probable cause did not exist to name the person in the application, there would not exist sufficient probable cause under Fourth Amendment standards to obtain a warrant against the named person, although this would not mean probable cause would not exist to intercept that person's conversation as a member of the class of "others not yet known." The statutory provisions requiring the authorizing judge to make specifically detailed probable cause findings support the conclusion that probable cause, and not suspicion, must exist as to both criminal involvement and use of the facility. *See* 18 U.S.C. § 2518(3). Consequently, if the government, at the time the application is made, has probable cause to "know" the person, the application and order under the terms of Title III must name that person or suppression of that person's monitored conversations will be appropriate.[2]

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[2] Violation of the statutory requirements by a deliberate failure to list the name of the individual whose conversations the government intends to monitor is directly analogus to a violation of the constitutional requirements by a deliberate failure to describe in a warrant the property the government intends to seize. In Coolidge v. New Hampshire 403 U.S.

[7] This requirement could put the government in the awkward and unfairly precarious position of having to choose whether to name the individual in the application when questionable probable cause exists and risk being turned down by the authorizing judge as to that person, or proceed to investigate under the authorization of "others yet unknown" and face a possible challenge that the individual should have been named in the order. For this reason, the court believes a strong and clear, and not questionable, showing of probable cause existing at the time of the application is needed to sustain a motion to suppress after the wiretap has concluded, such a showing being tantamount to demonstrating a conscious disregard for the dictates of Title III.[3]

443, 471, 91 S.Ct. 2022, 2040, 29 L.Ed.2d 564, the court stated,

> If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirements of "Warrants . . . particularly describing . . . [the] things to be seized." The initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

[3] 18 U.S.C. § 2515 prohibits the use as evidence of intercepted communications "if the disclosure of the information would be in violation of this chapter." A knowing and de-

Defendant avers that he was under investigation by the government, which on March 30 had strong suspicions of his involvement. These suspicions, defendant claims, were verified by interceptions obtained through an interception authorized on March 30 and, with this knowledge, the government had a duty to secure his name in the order of April 14.

[8] At a prior hearing, the government represented by counsel that it did not have probable cause on April 14 to seek inclusion of the name of Calman Bernstein in the authorization order. It is the government's position that he was at this time still in the class of "others as yet unknown." No evidence or testimony was presented at this hearing and there exists no record to conclusively support or deny this representation, although defendant has proffered transcript of his calls intercepted under the March 30 order which he contends verified the government's prior investigatory suspicions. Nothing though has been offered to establish the existence of those prior investigatory suspicions. Absent an adequate record, the court cannot rule on the scope of the government's knowledge at the time of the application. Therefore, an evidentiary hearing on this point, in accordance with this opinion, shall be held at a date to be scheduled.

There remains pending a motion by defendant Berstein for the suppression of evidence seized at

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liberate failure to follow the statute's clear procedure would be a violation of Title III.

the time of his arrest. Since this motion also rests on disputed facts, an evidentiary hearing is needed for its resolution. The court will hold an evidentiary hearing on this motion at the same time the evidentiary hearing regarding the government's prior knowledge is held.

APPENDIX E

UNITED STATES DISTRICT COURT
D. MARYLAND

Crim. Nos. 72-0433-B, 72-0434-B

UNITED STATES OF AMERICA

v.

ROBERT S. CURRERI ET AL.

UNITED STATES OF AMERICA

v.

PATRICIA BLEAU ET AL.
(Consolidated cases)

Dec. 11, 1973

* * * *

MEMORANDUM AND ORDER

BLAIR, District Judge.

Calman Bernstein, a defendant in this prosecution under 18 U.S.C. § 1955 for alleged gambling activities, moved to suppress evidence obtained under a wiretap authorization order entered on April 14, 1972. In addition, he moved to suppress evidence seized at the time of his arrest. Since both motions rested on disputed facts, this court held an evidentiary hearing to resolve the issues presented.

As a result of facts brought to light at the hearing, this court directed that the government make available all records in its possession that contained references to Mr. Bernstein, which the court would then examine *in camera*. After the examination, the court turned over these records to the defendant, with all extraneous material and material which would have disclosed confidential informants excised. Subsequent to his examination of these records, Mr. Bernstein filed a further motion to suppress, this one relating to the conversations intercepted under a wiretap authorization order entered on March 30, 1972, the first in a series of four. The facts now before the court as revealed by the evidence presented at the hearing and by the government's subsequent production of documents, permit final disposition of all three motions. The court will first address the two motions to suppress the wiretap evidence, and will subsequently address the motion to suppress the evidence seized at the time of Mr. Bernstein's arrest.

I.

[1] In a Memorandum Opinion dated July 11, 1973, United States v. Bleau et al., 363 F.Supp. 438 (D.Md. 1973), this court dealt with the legal issues applicable to Mr. Bernstein's first motion to suppress. In that opinion, this court noted that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereafter Title III), 18 U.S.C. § 2510 et seq., imposes a qualified requirement that a party whose conversations are to be intercepted be named in the

application and order. Section 2518(1)(b)(iv) requires a listing in the wiretap application of "the identity of the person, if known, committing the offense and whose communications are to be intercepted." Section 2518(4)(a) similarly requires that the authorization order list "the identity of the person, if known, whose communications are to be intercepted." These provisions, among others, are designed to insure that the authorizing judge's order—i. e., the warrant—will be adequately particularized according to Fourth Amendment standards as enunciated in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). *See* Senate Report No. 1097, 1968 U.S. Code Congressional and Administrative News, 2112, 2189-90. They are also keyed to Title III's notice provisions—an integral part of the statute—in that those named in the order receive an inventory as a matter of right while others whose communications are intercepted in the course of the wiretap receive an inventory only in the discretion of the authorizing judge. 18 U.S.C. § 2518(8)(d).

[2-4] The listing in the warrant of the name of the owner of the premises to be searched or the things to be seized is not specifically required by the Fourth Amendment, which provides that "no Warrants shall issue, but upon * * * particularly describing the place to be searched, and the person or things to be seized." Hanger v. United States, 398 F.2d 91, 99 (8th Cir. 1968), cert. denied, 393 U.S. 1119, 89 S.Ct. 995, 22

L.Ed.2d 124 (1969). All that needs be particularly described for Fourth Amendment compliance is the place to be searched and the thing or person to be seized. *See* Berger v. New York, 388 U.S. 41, 58-59, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). In regard to telephone communications, it thus appears that the Fourth Amendment permits seizure of particularly described conversations from a particularly described place without naming the speaker in the warrant. United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972).

Congress, however, apparently determined that a higher degree of particularization was desirable and required in Title III that the speaker be identified, but only upon a condition of reasonableness that the speaker be named "if known." On the other hand, if only by implication, if the speaker's identity is not "known", conversations of the type and from the place particularly described can still be seized. Because the Fourth Amendment does not demand an owner's name be in a search warrant otherwise properly descriptive, a failure to name an individual could only be violative of Title III's requirements and not those of the Fourth Amendment. If suppression is proper, it would be the result of a failure to comply with Title III rather than the Fourth Amendment.

[5, 6] Since Title III requires the naming only of those who are "known", it must be determined who fits into the class of knowns, and who, in the unknowns. United States v. Kahn, 471 F.2d 191 (7th Cir. 1972), cert. granted, 411 U.S. 980, 93 S.Ct. 2275,

36 L.Ed.2d 956 (1973). In its Memorandum Opinion dated July 11, 1973, *supra*, this court outlined the standards it would require the government to adhere to in naming persons whose conversations were to be intercepted in wiretaps authorized under Title III. Briefly, the court therein held that "[b]efore there is a need for the wiretap order to specifically list a person whose conversations are to be intercepted, the government must, at the time the order is applied for, have probable cause to believe that person is involved in the criminal activity the wiretap seeks to monitor *and* is a user of the communication facility for that illegal purpose." Memorandum Opinion, *supra* at 6-7. (emphasis added). This court further stated that it believed "a strong and clear, and not questionable, showing of probable cause existing at the time of the application is needed to sustain a motion to suppress after the wiretap has concluded, such a showing being tantamount to demonstrating a conscious disregard for the dictates of Title III." *Id.* at 8.

Mr. Bernstern premised his first motion on his involvement in the gambling operation under investigation was "known" to the government as understood in Title III. If true, he contends, this would trigger the requirement that he be specifically named in the application as one whose conversations were to be intercepted. Since he was not so named, he argues, the government has violated the statutory requirement, and his seized conversations must be suppressed under 18 U.S.C. §§ 2515 and 2518(10)(a).

To resolve this issue, the court must examine in detail the information available to the government at the time of application for both wiretap orders.

The records of the Baltimore Office of the F. B. I. reveal that information was developed about Mr. Bernstein beginning in June 1971. At that time, files were opened in the names of "Cal Bernstein" and "Calman Bernstein" and were numbered with the prefix "182", indicating that Mr. Bernstein was suspected of illegal gambling activity (Motion Exhibit 2). Subsequently, on November 13, 1971, a confidential informant, described in these proceedings as Confidential Informant No. 2, advised a special agent of the F. B. I. that Mr. Bernstein was engaged in gambling activity and that a certain third person, identified to the special agent but unnamed here, "is handling the lay-off action of Cal Bernstein." Motion Exhibits 5, 6. One week later, on November 20, 1971, Informant No. 2 identified a person who "personally collects Cal Bernstein's lay-off action from Bernstein at his tavern, located in the Highlandtown section of Baltimore, Maryland." Motion Exhibit 5.

Two months later, on January 18, 1972, the special agent learned from Informant No. 2 that, as of that date, "Robert Curreri [whose telephones the government sought to tap in its applications of March 30 and April 14] was operating a large numbers gambling business and giving his lay-off to Cal Bernstein who, in turn, was laying off to" another person whom the informant identified. Motion Exhibits 3, 5. In the lower left corner of the report of this inter-

view there are typed together, for filing purposes, the names of Cal Bernstein and Robert Curreri. Motion Exhibit 3. In the lower right corner is the signature of another special agent who would eventually serve as affiant in the government's application for the wiretap order. Motion Exhibit 3. This special agent, who was in charge of this case, testified at the evidentiary hearing and acknowledged that Informant No. 2 was known to be reliable. He also said that he had been told by another informant that a man named "Cal" was active in the Baltimore gambling community. As a consequence of this latter information, the special agent, on February 28, 1972, visited the head of the Baltimore City Police Department Vice Squad, who identified "Cal" as Calman Bernstein and also informed the special agent that Mr. Bernstein was reputed to be engaged in gambling and that he believed that he was so engaged. *See also* Motion Exhibit 5.

On March 1, 1972 this special agent prepared an affidavit for electronic interception. Motion Exhibit 5. The affidavit, which identified Mr. Bernstein and Mr. Curreri by name, stated that there was probable cause to believe that they were then engaged together in an illegal gambling business; that the telephones at Ocean Pride Seafood, among others, were being used to carry out the illegal business; and that evidence against them might be obtained through interception of wire communications. Motion Exhibit 5 at 1, 2. On March 3, 1972, the proposed affidavit was submitted to the F. B. I. headquarters in Washington,

D. C., for review, in accordance with established procedure. Four days later, on March 7th, the Washington office advised its Baltimore office that, "[a] review of your affidavit indicates that the subjects are engaged in a gambling operation which appears to warrant Title III electronic surveillance coverage." Motion Exhibit 1. Headquarters requested, however, that, "[t]o corroborate information provided by informants, you should attempt to develop additional current information regarding . . . Calman Bernstein." *Id.* On March 8, 1972, the day after this message had been received, a special agent interviewed another confidential informant for the purpose of obtaining current information as to Mr. Curreri and Mr. Bernstein. This informant related that Mr. Curreri was then "active in the numbers field" and that he was "laying off to Cal Bernstein." Motion Exhibit 4.

Notwithstanding this latest information, which also tied Mr. Bernstein to the Curreri operation, the government chose not to name him in its application for the March 30 order. In the course of the subsequently authorized wiretap, the government intercepted two calls that related to Mr. Bernstein. In the first, on April 11, 1972, two men identified as "Bob" and "Cal" engaged in an extended discussion of the mechanics of the gambling operation. Motion Exhibit 7. The second, on April 12, contained a passing reference to Mr. Bernstein. Motion Exhibit 8.

In his original motion to suppress, Mr. Bernstein argued that the first gambling-related conversation

sufficiently involved Mr. Bernstein in the gambling operation to move him from the category of "others unknown" to that of "known" within the meaning of Title III, requiring that he be specifically named in the application as one whose conversations would be intercepted. In his second motion, he contends that, based on the facts as brought forth by the evidentiary hearing, the government, even prior to its interception of the first gambling-related call, had sufficient probable cause to know of his involvement in the gambling operation, thereby triggering the Title III requirement that he be specifically named in the application as one whose conversations were to be intercepted.

[7] The court will first address the later motion —which relates to suppression of the conversations intercepted in the course of the March 30, 1972 tap. In this motion, defendant seems to assume that a strong showing of a person's involvement in a gambling operation leads *a fortiori* to the conclusion that such person will use the telephones of his co-conspirators in furtherance of that illegal activity. The Fourth Circuit has held that one who accepts "lay offs" [1] from another can be an integral part of the gambling system, since the laying off of bets is necessary "to achieve the goal of balanced books essential to a bookmaking system without risk of loss."

[1] "When a betting person has more money bet on a participant then he wishes, he transfers all or a part of the bet to someone else. This is called laying off." United States v. Bobo, 477 F.2d 974 (1973) at 990 n.9.

United States v. Bobo, 477 F.2d 974, 990 (1973). Thus, this court agrees with defendant that the evidence available to the government at the time of the application amounted to probable cause to believe that Mr. Bernstein was involved in the illegal activity the wiretap sought to monitor. However, it is unable to agree that such showing of involvement, without more, establishes probable cause to believe that he will use the telephones of all others whose involvement in the scheme is also established. In so doing, defendant appears to slight the second prong of the two-pronged test for the need to specifically list a person in the wiretap order—probable cause to believe that he is a user of the facility. Both prongs must be satisfied by "a strong and clear, and not questionable, showing of probable cause." To argue that probable cause can be found from such facts alone is to equate probable cause with permissible inference and, in this court's view, does not satisfy the higher standard which Congress required.

To demonstrate the type of independent verification this court believes would supply the necessary probable cause, this court points to informant testimony as regards Mr. Curreri and "an individual known as Bernice." One informant of high reliability stated specifically that he knew that "an individual known as Bernice" would be "handling the telephone at Curreri's numbers office" for the illegal gambling operation then under investigation, Motion Exhibit 5 at 7, and she was listed in the wiretap order of March 30, 1972 as one whose conversations were to

be intercepted. Similarly, several informants asserted that they knew from personal observation that Mr. Curreri was a user of the Ocean Pride telephones for that illegal purpose, Motion Exhibit 5, and he too was listed in the order.

[8] In examining the record, the court finds no independent verification of the probability that Mr. Bernstein was a user of the telephones the government sought to monitor, save for the bald assertions to that effect contained in the government's March 3 affidavit that had been rejected by F. B. I. headquarters. As a result, this court finds that as of March 30, 1972, Calman Bernstein was not "known" to the government in a manner that required his listing under the provisions of Title III in the application and order for the March 30, 1972 wiretap, and his motion to suppress conversations intercepted in the course of that wiretap is hereby denied.

[9] Next, the court will address Mr. Bernstein's first motion to suppress—which related to suppression of the conversations intercepted in the course of the wiretap authorized on April 14, 1972. In the course of the discussion above, the court determined that information available to the government established "strong and clear" probable cause as to Mr. Bernstein's involvement in the gambling scheme under investigation. The question this court must now resolve is whether or not the information intercepted as a result of the March 30, 1972 wiretap order moved Mr. Bernstein from the category of "others unknown" to that of one "known", requiring his

specific listing in the April 14 wiretap application and order—in other words, whether or not the second prong of the two-pronged test was satisfied. To do so, the intercepted conversations would have to establish either actual use, or a strong probability of use, of the monitored telephones by Mr. Bernstein for the illegal activity the government was investigating.

As mentioned above, Mr. Bernstein in fact did use the monitored telephone on March 11, 1972 for that illegal purpose. Motion Exhibit 7. This conversation was noted in the F. B. I. monitoring logs, and the monitoring officers indicated at the hearing that on the day of the interception they discussed the conversation with the special agent who was in charge of the investigation and who, four days later, was the affiant in the April 14 application. Even though the caller was identified only as "Cal", this court is constrained to note that the information available to the government at the time of the intercept could lead to only one conclusion—that "Cal" was indeed Calman Bernstein. In fact, the testimony of the three special agents at the hearing lead the court to conclude that they had immediately assumed that "Cal" was Calman Bernstein. One agent testified that he was familiar with Calman Bernstein and had investigated him "for at least several months", and he understood immediately the significance of the call which had come from "Cal". Another agent stated that the three agents had "speculated" that they had inter-

cepted a gambling conversation between Mr. Bernstein and Mr. Curreri.

On the following day, April 12, 1972, another call involving "Cal" was intercepted. Motion Exhibit 8. The caller asked "Bob" for "Cal's telephone number." "Bob" replied, "Yea, I have it but I'm not supposed to give it out," and then suggested "You call him at the bar; the number is 732-9722." One of the special agents testified that he knew at the time of the intercept that Mr. Bernstein owned a bar, and knew its name and location. This call, too, was discussed by the special agents on the day of the intercept.

At this point, it might reasonably be asserted that the sheer mechanics of the tap would not enable the government to process the information quickly enough to utilize it in the application of April 14. In fact, the last conversation used in the application to justify extension of the tap was intercepted on April 10. Arguably, if it takes a day or two to transcribe the tape recordings, plus a day or two to prepare the application and the affidavits, plus a day or two for the authorizing judge to review the file, it would be unreasonable to require the government to act on material not physically available at the time of application. For this reason, the government could argue quite persuasively that the above-mentioned conversations intercepted on April 11 and April 12 in the course of the first wiretap, Motion Exhibits 7 and 8, were not available at the time of the second application for extension.

[10] While this court will assume without deciding that the latter conversation could not reasonably be considered in the application of April 14, it does not so find in the case of the conversation of April 11. This conversation of April 11 between Mr. Curreri and Mr. Bernstein supplied sufficient—i. e., "strong and clear"—probable cause for the government to believe that Mr. Bernstein would use the tapped telephones, satisfying the hitherto unsatisfied second prong of the naming requirement. Absolute assurance on the part of the government that the caller "Cal" was in fact Calman Bernstein is not required to show probable cause. After examining the record, the court finds that probable cause existed to believe that the caller was Calman Bernstein.

As a result, Mr. Bernstein was "known" within the meaning of Title III's naming requirement at the time of the April 14, 1972 application and his motion to suppress the conversations intercepted in the course of the tap authorized by the order of that date is hereby granted.[2]

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[2] Viewed from other perspectives, the result which the court reaches here may appear anomalous. Had the government agents been less diligent in their investigation and therefore had less knowledge about the defendant he may not have been "known" to them. The interceptions then may have been serendipitously beneficial to the government. Or had the government sought and obtained originally an order permitting interception for 30 days instead of 15 days as it did —the monitored conversations now suppressed may have passed muster. From these considerations, it may appear that the government is penalized for diligence, prudence and restraint. The court's resolution of the issue, however, must

II.

The defendant has also moved to suppress evidence seized during the search of his person at the time of his arrest on August 30, 1972. On that date, the arresting officers, special agents of the F.B.I., acting pursuant to a valid arrest warrant, stopped Mr. Bernstein as he departed a Baltimore restaurant in midmorning and informed him that he was under arrest. Thereupon, as the agents recount it, they had the defendant lean against a parked automobile as one of the agents conducted a patdown for weapons. In the course of the patdown, the agent felt a firm lump in the right front pocket of the defendant, reached into the pocket, and pulled out a one-inch thick wad of bills and two three-by-five cards. Written on these cards were lists of names and figures.

Defendant seeks to suppress the introduction into evidence of these cards, alleging in his motion a violation of his Fifth Amendment privilege against self-incrimination and a violation of the Fourth Amendment proscription against unreasonable searches.

[11] This court will deal with the Fifth Amendment consideration first, since, in cases that assert both Fifth and Fourth Amendment violations, the Fifth Amendment issue should be resolved initially. Schmerber v. California, 384 U.S. 757, 767-768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); Hill v. Philpott, 445 F.2d 144, 148 (7th Cir. 1971).

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come from an application of the law to the facts presented, anomalous consequences aside.

Defendant Bernstein, presumably on the grounds that the cards are testimonial or communicative in nature—the equivalent of private books and records at issue in Hill v. Philpott,[3] 445 F.2d 144 (7th Cir. 1971), cert. denied, 404 U.S. 991, 92 S.Ct. 533, 30 L.Ed.2d 5—claims that their introduction into evidence at trial would violate his Fifth Amendment privilege against self-incrimination. On the facts presented by this case, this court finds more persuasive the more recent Sixth Circuit case, United States v. Blank, 459 F.2d 383 (1972), cert. denied, 409 U.S. 887, 93 S.Ct. 111, 34 L.Ed.2d 143 (1972). In *Blank*, the evidence sought to be suppressed represented work sheets, allegedly in defendant's handwriting, of a sports and horse book betting business that were seized under an admittedly valid search warrant. The District Court had suppressed the evidence on Fifth Amendment grounds, and the Court of Appeals vacated the suppression order. The court based its decision on two primary facts, both applicable to the case at bar:

> 1) The subjects of the seizure are not personal communications at all but rather business accounts rendered extraordinary only by the fact that the business is itself illegal.

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[3] Hill v. Philpott held that the defendant's Fifth Amendment privilege against self-incrimination had been violated by seizure of his private books and records, despite the fact that the materials had been seized pursuant to a search warrant valid under the Fourth Amendment.

2) These are not privately recorded and privately held thoughts or descriptions of events, as in the case of a closely held diary, but rather business records of which other persons must have knowledge. [footnote omitted].

* * * *

In summary, we feel that appellant was not "compelled" to produce these papers in violation of the Fifth Amendment; that the papers are not communicative in nature; that the papers are business records rather than personal and private writings; and that they are on their face instrumentalities of the crime with which appellant is charged. So viewed, they are subject to seizure under Fourth Amendment search warrant procedures and having been so seized, should not have been suppressed. United States v. Blank, 459 F.2d 383 at 386-387.

[12] In Mr. Bernstein's case, the two cards were seized in compliance with Fourth Amendment procedures as will be shown, *infra*; the seizures in no way involved compulsion within the meaning of the Fifth Amendment,[4] and the cards were the business records and instrumentalities of the illegal activity. For these reasons, this court denies defendant's motion,

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[4] *See* United States v. Blank, 459 F.2d 383 (6 Cir.) at 385. The seizure incident to the arrest involved no compulsion to produce demanded information as would, for example, a subpoena. In other words, there was no demand for affirmative action. *See* Boyd v. *United States*, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1885); Schmerber v. California, 384 U.S. 757, at 763-764, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

based on Fifth Amendment grounds, to suppress the two cards seized by the government.

[13] The court now turns to the defendant's claim that the search itself offended the constitutional requirements of the Fourth Amendment. Searches incident to a lawful arrest, with or without a warrant, do not offend Fourth Amendment safeguards provided they are reasonable searches. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). As the Supreme Court said in *Chimel*:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. * * * In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.
>
> 395 U.S. at 762-763, 89 S.Ct. at 2040.

[14] The search incident to arrest in the case at bar complies with the standards enumerated in *Chimel*. The agent who searched the defendant testified that the patdown and search were protective—to determine if Mr. Bernstein, a former police officer, carried a weapon. This court is persuaded and accepts as a fact that the agent had a reasonable apprehension that the "hard lump" he felt in Mr. Bernstein's pocket might be a weapon. This provided sufficient cause for the agent to reach into Mr. Bernstein's pocket to remove the suspicious object. In so

doing, the incriminating evidence was inadvertently removed in the process. On this basis alone, the court would deny Mr. Bernstein's motion to suppress.

[15, 16] It must be noted, of course, that *Chimel* permits a much more extensive warrantless search of an arrestee than the simple search for weapons that the agents claimed to be conducting herein. A search for evidence incident to arrest would also be permitted as long as it was reasonable. The defendant, however, claims that a search incident to a lawful arrest can proceed beyond a protective patdown for weapons only if the arresting officer has probable cause to believe that destructible evidence of the crime will be found on the person.[5] Defendant cites several cases to support his theory, but none are on point. Each involved a search of the person following a warrantless arrest for a traffic offense, and it is clear to this court that a search of an offender's person for evidence of a traffic offense is, without more, manifestly unreasonable. The court is persuaded that even if the sole purpose of the search at the time of arrest

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[5] It is not entirely settled that the search must be for evidence reasonably related to the crime for which the warrant issued. *See, e.g.*, United States v. Simpson, 453 F.2d 1028, 1030 (1972), cert. denied, 408 U.S. 925, 92 S.Ct. 2504, 33 L.Ed.2d 337 (1972), where the Tenth Circuit upheld the search of the arrestee's wallet and the seizure of evidence therein upon his lawful arrest on a dynamite charge. Nonetheless, the court is convinced that the search in this case, if it had been for evidence, would have borne a reasonable relationship to the crime for which the defendant was arrested. *See* United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969).

had been for evidence, it would nonetheless be a lawful search in this instance.

For the above-stated reasons, this court finds that defendant's motion to suppress the evidence on Fourth Amendment grounds must also be denied.

APPENDIX F

DM-7
Day 13 April 11, 1972
Reel #1

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* * * *

Call #14 (Page 4) 5:17 p.m. Incoming call
Male #1: Unknown
Male #2: CAL
Male #3: BOB

DM-7
Day Number 13
Telephone Number 301—821-1741

#14 Incoming Call to 821-1741
at 5:17 p.m.

UNKNOWN Male #1: Ah he is busy right.

BERNSTEIN Male #2: All right, well I had a message to call him. Tell him that CAL called and ah . . .

UNKNOWN Male #1: Oh hold on CAL, I think he wants to talk to you.

BERNSTEIN Male #2: Okay.

UNKNOWN #1: CAL, he'll be with you in a minute.

BERNSTEIN #2: Okay, right.

CURRERI Male #3: Hello

BERNSTEIN Male #2: You okay.

CURRERI Male #3: Yeah, yes sir.

Yeah, what happened?

BERNSTEIN #3: What's that?

CURRERI #2: Yesterday.

BERNSTEIN #3: What do you mean what happened?

CURRERI #2: Nobody said nothing.

BERNSTEIN #3: Huh?

CURRERI #2: We didn't find out until noon today.

BERNSTEIN #3: Well, I didn't find out until, well you found out about quarter to 12 and I found out about 11:30.

CURRERI #2: Uh-uh-uh.

BERNSTEIN #3: You pay off. I hope you did. I hope you get stuck up your ass.

CURRERI #2: They all had it.

BERNSTEIN #3: Huh? All that's a lot of shit.

CURRERI #2: Well the guy is trying to go around, it's the, ah mostly his work not mine.

BERNSTEIN #3: I ah I can't even believe how anybody can try anything like that I mean, christ I don't know anybody that paid off. Nobody.

CURRERI #2: Well, I ah it was even, nobody said it was unofficial last night or any . . .

BERNSTEIN #3: It's never unofficial and it's never official.

CURRERI #2: Well the thing is like with these guys it ah you got a guy that's got a dollar or two dollars and he is gonna . . .

BERNSTEIN #3: I ah BOB, I got the same things. And I don't subtract it from the ribbon until after 1:00 the next day. I call them and give them a new balance, when service opens. And I believe I told you that before.

CURRERI #2: Well.

BERNSTEIN #3: And that's the only way to do it.

CURRERI #2: Well, it's just I ah gonna have to do that now. I guess Christ, I . . .

BERNSTEIN #3: Christ, you should've done it . . .

CURRERI #2: I had like $20 on that fucking thing.

BERNSTEIN #3: How much?

CURRERI #2: About 20.

BERNSTEIN #3: Oh, I had, I didn't have no where near that, but ah ah

CURRERI #2: Christ, one guy he had 5 75. Says he paid the whole

BERNSTEIN #3: Well, that's good.

CURRERI #2: Now he's got the other guy, he wants to go with him to try to get it back tonight.

BERNSTEIN #3: (laughing)

CURRERI #2: Yeah.

BERNSTEIN #3: Christ, I never paid one person off. Not one. Remember when I give you that money. I said hold off until the next day until we check it off.

CURRERI #2: Yeah.

BERNSTEIN #3: That's all, I do that all the time.

CURRERI #2: Well, another expensive lesson I guess.

BERNSTEIN #2: How in the hell did they fuck so bad with that shit though?

BERNSTEIN #3: I don't know the morning papers got the same mistake.

CURRERI #2: Uh-uh-uh.

BERNSTEIN #3: I mean they came over the wires, that's all. I'll tell you got another bad one today going.

CURRERI #2: That's all I need.

BERNSTEIN #3: A pair of aces in the lead.

CURRERI #2: That's nice.

BERNSTEIN #3: Yeah, I got a whole . . .

CURRERI #2: And yesterday I think I had ah whole quarter hit on 398.

BERNSTEIN #3: Yeah, I had ah

CURRERI #2: And here this way, I would with $20.

BERNSTEIN #3: Yeah, Well you are gonna have to wound up paying them both off.

CURRERI #2: Hum, well who cares about the quarter.

BERNSTEIN #3: Yeah, I mean ah what the hell. I don't pay nobody until the next day. I don't subtract no ribbons.

CURRERI #2: Oh, well, then that's, that's the only thing I have to do then.

BERNSTEIN #3: Because there is no such thing as an official number. And you can do the same thing I do when I get up in the morning. It just happened that I had a doctor's appointment this morning and couldn't get to your racing form until around ah . . .

CURRERI #2: Yeah, but the only thing with that is though CAL, is I used to do that every morning until I found out that that was wrong once.

BERNSTEIN # 3: Well it's not the idea of it being wrong, it's the idea that if you take the Morning Sun, the scratch sheet and the racing form and get a different figure from anyone of them, there's a question. And as soon as I got the racing form today it was 398, that was about quarter after 11. I rushed to the phone booth, made a few calls, got a hold of somebody and you know, just to see what they said and they said hold it up. And I held it up, and I ah I called her right away. And I said call everybody.

CURRERI #2: Hum.

BERNSTEIN #3: And she got a hold of your mother, I guess it was at home. What home, she said she was finished calling by 5 of 12, so whether she got her . . .

CURRERI #2: Yeah.

BERNSTEIN #3: It took her about 15 minutes to call everybody.

CURRERI #2: Ah the only thing that ah you upset me a little is that I thought may be they found out last night.

BERNSTEIN #3: No, no, no.

CURRERI #2: And didn't call nobody. I mean look if that's the way it happened, that's the way it happened. It's nothing you know, anybody can do.

BERNSTEIN #3: That one time, didn't I call your mother?

CURRERI #2: Yeah.

BERNSTEIN #3: That Sunday.

CURRERI #2: Well, the thing is though, ah you can tell your girl, give her my ah you know this number here and ah well you got them all, because you know I'm either here or home or someplace. You know if you find out that night.

BERNSTEIN #3: Oh look, if I find out that night, I am gonna get a hold of your mother right away or get a hold of you.

CURRERI #2: Yeah.

BERNSTEIN #3: Don't worry, ah look I would have been the happiest person in the world to make those calls last night.

CURRERI #2: Hum.

BERNSTEIN #3: Because ah huh, ah one thing I had the thing cut but still it's, christ it's $8,000.

CURRERI #2: I never had it cut. Listen on my new cut list, do I have one's across?

BERNSTEIN #3: I ah I don't have it here. I don't have it, ah look I'm call . . .

CURRERI #3: You can ask the girl ah no they don't have it either.

BERNSTEIN #2: I'm ah out down by Radecke Park in a phone booth.

CURRERI #3: Hum.

BERNSTEIN #2: All right, well . . .

CURRERI #3: Well . . .

BERNSTEIN #2: Now don't you, listen anytime I find it out, if it's 4 o'clock in the morning, I'll call.

CURRERI #3: Okay.

BERNSTEIN #2: And ah I'd do it to everybody.

CURRERI #3: All right, now you say 1 o'clock is safe the next day?

BERNSTEIN #2: I'd say 1:30 because the first race at Pimlico is at 1.

CURRERI #3: Uh huh.

BERNSTEIN #2: They might get in there at 1:10 and the line might be tied up for 10 minutes.

CURRERI #3: Uh huh. Okay, well that's just what I'll have to do, then that's all.

BERNSTEIN #2: I don't pay nobody until, until after I get an okay or I never did. Only you know like I pay you, there is a couple other ones I know, I'd tell. But that's a different story.

CURRERI #3: All right, well look I'll just tell everybody then, I'm not paying nobody until 1:30 the next day.

BERNSTEIN #2: Straighten them out, you're better off, what the hell the ah the one time can cost you a fortune.

CURRERI #3: It did.

BERNSTEIN #2: All right, okay, I'll talk to you later.

CURRERI #3: Okay CAL.

BERNSTEIN #2: All right, bye.

(End of Conversation)

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